

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 11, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1924-CR

Cir. Ct. No. 2014CF3476

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CLIFFORD YOUNG,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Sherman, Kloppenburg and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Clifford Young appeals a judgment of conviction and an order denying his postconviction motion. We affirm.

¶2 After a jury trial, Young was convicted of several felonies and misdemeanors in connection with an incident in which he physically attacked a woman, restrained her in a residence, and then pushed her out a window. The circuit court denied Young's postconviction motion alleging ineffective assistance of trial counsel.

¶3 To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that such performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

¶4 Because the circuit court denied the motion without an evidentiary hearing, the question before us is whether Young was entitled to an evidentiary hearing on one or more of his allegations of ineffective assistance of counsel. To decide that question, we consider whether Young's motion alleged facts which, if true, would entitle him to relief. That is a question of law we review without deference to the circuit court. *State v. Bentley*, 201 Wis. 2d 303, 310, 548 N.W.2d 50 (1996).

¶5 Young first argues that his trial counsel was ineffective by not moving to dismiss the felony charges on the ground that the circuit court lost

competency to proceed after it failed to hold the preliminary hearing within the ten-day period provided in WIS. STAT. § 970.03(2) (2015-16)¹. The preliminary hearing was continued for a period of one day because Young's attorney failed to attend the hearing of August 18, 2014.

¶6 Young's argument is based partly on the proposition that the originally scheduled hearing date of August 18, 2014 was outside the ten-day period for holding the preliminary hearing. In response, the State notes that the tenth day was a Sunday, and the next day, Monday, was August 18, 2014. So, the State argues that August 18, 2014 is properly considered the last day of the ten-day period, as provided in WIS. STAT. § 990.001(4)(b).

¶7 Young does not dispute this point in reply. Accordingly, Young's argument is reduced to a simple one. Specifically, he argues that his trial counsel was ineffective for failing to argue to the circuit court that it should have dismissed the case instead of continuing the hearing by one day when Young's attorney failed to appear.

¶8 Young acknowledges that the time for the preliminary hearing may be extended on motion of a party and a showing of good cause. *See* WIS. STAT. § 970.03(2). However, he does not contend that his trial counsel could have argued that good cause did not exist to continue the time of the preliminary.

¶9 Nor does Young develop any other argument that his trial counsel could have made that would have led the circuit court to retract its extension and

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

dismiss the case. The closest Young appears to come to that is in a one-sentence assertion that “the record does not show that any motion was made to extend the time.” If Young was intending to argue there that the circuit court lacked authority to extend the time *on its own motion*, as it appears to have done, he has not developed that argument or supported it with legal authority.

¶10 Based on our review of the existing record, and in light of Young’s failure to develop an argument showing that there is even the slightest possibility that a different action by trial counsel would have led to dismissal, we conclude that Young has failed to allege facts that, if true, would entitle him to relief.

¶11 Young’s second argument is that his trial counsel failed to investigate and subpoena several witnesses for trial. Initially, he contends that counsel should have called a witness who would have testified that Young was calm and walked to a grocery store after the incident. Young argues that this testimony would have been contrary to the claim that Young fled from the scene, and would have confirmed Young’s testimony that he was in shock over the incident.

¶12 We are unable to see significant probative value in this proposed testimony. This testimony relates only to Young’s actions and demeanor after the incident, and is minor when compared to the testimony from both the victim and Young about the incident itself. Furthermore, as the State points out and Young appears to concede in reply, calm demeanor may be ambiguous and would not necessarily help Young’s position with the jury. Accordingly, even if this witness would have testified as Young now alleges, we conclude that Young has failed to allege facts that, if true, would entitle him to relief. Young’s allegations show neither deficient performance by his attorney nor prejudice.

¶13 Next, Young argues that his trial counsel should have called a witness who would have testified that Young said, immediately after the incident, that the victim jumped from the window. This testimony would have been consistent with Young's own account at trial. Young argues that this additional testimony would have bolstered his credibility.

¶14 We conclude that the probative value of this evidence is low. The jury was able to view, during the trial, testimony by Young and the victim about what occurred during the incident, and to weigh their credibility on that basis. The fact that Young's testimony may have been consistent with his statement at the time of the incident is a minor point because, if Young's testimony was intentionally inaccurate, it is entirely plausible that he formed the intent to tell an inaccurate version shortly after the incident. This claim does not allege facts which, if true, would establish deficient performance or prejudice.

¶15 Young also argues that his trial counsel should have called as witnesses at trial Young's children and step-children. As we understand his argument, their testimony would have rebutted the allegation of false imprisonment by showing that the victim was freely able to move around the residence, and that Young left for periods of time. This argument fails because, as the State points out, the crime of false imprisonment does not require that the imprisonment be for a lengthy period of time. Indeed, Young does not point to any proposed testimony from the children that would rebut any allegation of imprisonment at any specific time. Therefore, this claim fails to allege facts which, if true, would show deficient performance or prejudice.

¶16 Additionally, Young argues that his trial counsel failed to obtain witnesses or evidence to verify what Young describes as the victim's prior act of

“self-defenestration”; that is, the act of propelling oneself out of a window. He argues that there was a prior incident in which the victim stated that she jumped out of a window to get away from Young. He argues that evidence of that prior incident would have confirmed Young’s version of how the victim went out the window in the current case.

¶17 Again, this argument fails due to the limited probative weight of the proposed evidence. Even if it is true that the victim jumped out a window once before, that would tell the jury nothing about the current case. This claim fails to allege facts that, if true, would show deficient performance or prejudice.

¶18 Finally, Young argues that his trial counsel was ineffective by failing to object to Young being placed in restraints in a wheelchair. His argument relies on at least three false characterizations of the record.

¶19 Young asserts that the circuit court did not make a finding that the restraints were necessary. This is false. The court explained the reasons for the restraints on the record at the start of proceedings on November 20, 2014.

¶20 Young asserts that “there was nothing to suggest that the persistent restraint of the defendant was required.” This is false. The record from the above date includes descriptions by both attorneys of Young’s behavior, and even his own attorney stated, after describing Young’s recent conduct, that “it was the first real moment of the last four days where I felt that something actually bad could happen beyond just anything verbal.”

¶21 Third, Young argues that the court should “at a minimum” have instructed the jury that the restraints should not be considered in reaching its decision. But, in fact, the court did that at the very beginning of its oral

instructions: “Now, some of you may have noticed that the defendant is in court today wearing a restraining device. This is not to be considered by you in any way and must not influence your verdict in any manner.”

¶22 In sum, Young’s arguments regarding the restraints have no relationship to the record in this case. Young fails to make a valid argument on this issue that suggests, under these circumstances, precisely what counsel should have done differently.

By the Court.—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

